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OFFICE OF GENERAL COUNSEL

MEMORANDUM

TO: Chief, Dockets Division

FROM: Associate General Counsel, Litigation Division

SUBJECT: American Personal Communications v. FCC & USA, No. 94-1549 Filing of a new Petition for Review filed in the United States Court of Appeals for the D.C. Circuit.

DATE: August 16, 1994

Docket No(s). ET 93-266 and GEN 90-314

File No(s). PP-6, PP-52 and PP-58

This is to advise you that on August 10, 1994, American Personal Communications, filed a Section 402(a) Petition for Review in the United States Court of Appeals for the District of Columbia Circuit. The FCC decision is: In the Matter of Review of the Pioneer's Preference Rules & In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 94-209, released August 9, 1994.

Challenge to the amendment of pioneer's preference rules requiring that recipients of pioneer's preferences in proceedings where tentative decisions on preference requests had been made at the time Congress enacted auction legislation must pay for their licenses. The decision applies to three proceedings -- 2 GHz PCS (Broadband PCS), local multipoint distribution service and low earth orbital satellite services in the 1.6/2/4 GHz band.

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed this case as No. 94-1549 and the attorney assigned to handle the litigation of this cases is James Carr.


Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

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AUG 17 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AUG 11 4 51 PM '94

AMERICAN PERSONAL COMMUNICATIONS,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,
Respondents.

OFFICE OF
GENERAL COUNSEL

No. 94 - 1549

Filed: 8/10/94

FEDERAL COMMUNICATIONS COMMISSION
SECRETARY
AUG 17 '94

PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

American Personal Communications ("APC"), pursuant to 28 U.S.C. §§ 2342 and 2344; Section 402(a) of the Communications Act, 47 U.S.C. § 402(a); and Rule 15(a) of the Federal Rules of Appellate Procedure, petitions this Court for review of an order of the Federal Communications Commission ("FCC"), entitled Memorandum Opinion and Order on Remand, FCC 94-209, released August 9, 1994, in the proceedings In the Matter of Review of the Pioneer's Preference Rules, ET Docket No. 93-266, and In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, PP-6, PP-52, and PP-58 ("Remand Order"). Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

In the Remand Order, the FCC modified its pioneer's preference rules, 47 C.F.R. § 1.402, to require that persons receiving pioneer's preferences in proceedings where tentative (but not final) decisions had been reached as of August 10,

1993, will be required to pay for their licenses, with the amount of the payment to be determined on a case-by-case basis. As to the pioneer's preferences awarded for broadband PCS service, the Commission decided that it would impose, as a condition on the licenses to be issued to the pioneer's preference recipients (like APC), a requirement that they must pay to the United States Treasury an amount equal to either:

- 1) 90% of the winning bid for the 30 MHz broadband MTA license in the same market as the pioneer's license, as determined in the PCS competitive bidding system held pursuant to Section 309(j) of the Communications Act, 47 U.S.C. § 309(j); or (2)

90% of an adjusted value of the license to be calculated based on the average per population price for the 30 MHz broadband MTA licenses in the top 10 MTAs, again as determined through successful bids in the § 309(j) competitive bidding system. As the basis for its authority to require pioneers to pay for their licenses, the FCC discussed only on Section 4(i) of the Communications Act, 47 U.S.C. § 154(i).

In imposing a requirement that pioneers pay substantial sums to the United States Treasury as a condition of receiving their licenses, the FCC clearly exceeded its statutory authority under the Communications Act. Neither Section 4(i) nor any other provision of the Act can be relied upon for the drastic and unprecedented requirement that pioneer licensees pay huge sums to the United States Treasury as a condition for obtaining their licenses.

The Commission also has no basis in the record for levying the enormous charges imposed by the Remand Order. The sums exacted are based on amounts collected through a system for allocating licenses that is wholly inapplicable to pioneers -- the competitive bidding system established under Section 309(j). The Commission appeared to believe that the charges imposed by the Remand Order would remedy some sort of financial advantage held by pioneers over their competitors. Not only is there no basis in the record for that rationale, but the record affirmatively contradicts it.

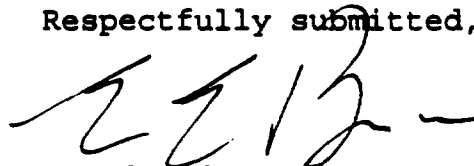
Furthermore, the FCC's pioneer's preference program guaranteed that successful pioneers would receive an FCC license as a reward for developing innovations in telecommunications technology. Numerous parties, including Petitioner APC, relied on that guarantee by investing millions of dollars and spending years of effort on developing innovative technology. The Commission has no authority to impose an after-the-fact requirement that pioneers pay enormous sums for those previously guaranteed licenses. Such action vitiates the government's prior commitments, on which the FCC encouraged parties to rely, and constitutes unlawful retroactive rulemaking.

For these and other reasons, APC requests that the Court rule that the FCC's attempt in the Remand Order to impose a payment condition on pioneers' licenses is unlawful,

arbitrary and capricious, not supported by substantial evidence, and otherwise not in accordance with law.

A prior consolidated case in this Court, Pacific Bell v. FCC, Nos. 94-1148 et al., arose out of these same FCC proceedings. By order dated July 26, 1994, the Court remanded that consolidated case to the FCC in light of the FCC's Emergency Motion for Remand, in which the FCC represented to the Court that it was in the process of reevaluating its position on the matters involved in that appeal. The FCC stated in its Emergency Motion that it would issue a new decision within two weeks if the Court remanded the case, and the Remand Order is the resulting new decision.

Respectfully submitted,



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Dated: August 10, 1994